UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

Case Caption: Schwan's Home Service Inc.,
Petitioner

16-1251

v.

Case Number: 27-CA-066674

National Labor Relations Board,
Respondent

PETITION FOR REVIEW OF AN AGENCY, BOARD, COMMISSION, OR OFFICER

Notice is hereby given this the 22nd day of July 20 16 that petitioner(s) Schwan's Home Service, Inc. hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the order of the respondent(s) National Labor Relations Board entered the 10th day of June 20 16 .

Attorney for Petitioner(s)/Pro Se Party,
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Kalamazoo, MI 49007
Telephone: (269) 388-6810

ORIGINAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to District of Columbia Circuit Rule 26.1, Schwan's Home Service, Inc. makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

ANSWER: Petitioner is not a publicly owned corporation. Petitioner's parent company is The Schwan Food Company.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

ANSWER: No

Respectfully submitted,

Date: July 22, 2016

Leigh M. Schultz (P71038)
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Attorneys for Petitioner

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CERTIFICATE OF SERVICE

On July 22, 2016, I served copies of the following documents:

- Petition for Review of an Agency, Board, Commission, or Officer
- Decision and Order dated June 10, 2016
- Corporate Disclosure Statement

by depositing said copies in First Class Mail addressed to:

Todd Saveland
Counsel for General Counsel, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
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Linda Dreeben
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Cindy Jo Schnotala

Cindy Jo Schnotala, Secretary
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16-1251

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Schwan's Home Service, Inc., a wholly owned subsidiary of the Schwan Food Company *and* Patrick K. Wardell. Case 27–CA–066674

June 10, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On June 6, 2012, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The Respondent produces, sells, and distributes frozen food products. It employs about 7000 employees at approximately 400 locations in the United States. Most of the employees are route sales representatives (RSRs), who sell and deliver these products to customers. The Respondent pays the RSRs a base salary plus commission on their sales, as well as automatic daily bonuses for coming to work and for meeting scheduling targets. The Respondent also employs material handlers who work in the Respondent's warehouses and receive and prepare the products for delivery to customers. Each employee is subject to the work rules (labeled "Standards of Conduct") contained in the Respondent's employee handbook, and must also sign an Employment, Confidentiality, Ownership & Noncompete Agreement (ECONA) that restricts disclosure of certain types of information.

At issue here are allegations that the Respondent unlawfully maintained three work rules and part of the ECONA.[2] It is well established that an employer violates Section 8(a)(1) of the Act by maintaining a work rule that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647.[3]

Briefly stated, the allegedly unlawful handbook rules that we now consider are: (1) restricting disclosure of company information (Rule 12); (2) requiring preapproval before disseminating information containing the company name (Rule 17); and (3) prohibiting conduct detrimental to the Respondent or its employees (Rule 26). The part of the ECONA alleged to be unlawful prohibits employees from sharing information about "wages, commissions, performance, or identity of employees." With little discussion, the judge dismissed the allegations that these directives violate the Act. He found that employees would reasonably understand the rules merely to protect the Respondent's legitimate business and proprietary interests, and that the ECONA furthered the Respondent's interest in preventing competitors from recruiting its employees. As support for these findings, the judge invoked the Board's decisions in *Lafayette Park*

[1] We shall amend the judge's Conclusions of Law and remedy and modify his recommended Order to conform to the violations found and to the Board's standard remedial language. We shall further modify the judge's recommended Order to provide for the posting of the notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010). We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[2] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by maintaining a handbook rule prohibiting solicitation in work areas during nonworking time, as well as a written policy prohibiting suspended employees from discussing their employment status with coworkers or customers. There are also no exceptions to the judge's dismissal of the allegation that certain language in the Respondent's termination letters is unlawful.

[3] Our dissenting colleague would overrule the Board's well-established, court-approved standard for assessing facial challenges to employer rules. We disagree for the reasons set forth fully in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 4–6 (2016). As to the dissent's claim that the Board's established standard has been "exceptionally difficult to apply . . . and it has consistently produced arbitrary results," we note that his proposed framework promises neither to simplify the required analysis nor to produce more predictable outcomes. Instead, by weighing a rule's *potential* impact on employees' rights in light of an extensive, nonexclusive list of potentially relevant factors, the dissent would appear effectively to expand our analysis of work rules far beyond their text to include practically every aspect of the employment relationship. Our colleague's analysis in this case illustrates the uncertainty inherent in his approach: he would find the prohibition of employee use of customer information lawful, in part because he speculates that it would be likely to impinge upon employees' protected conduct only "in limited circumstances." As explained below, we find it much more likely that this aspect of the rule would impinge upon protected conduct. In any case, as explained in detail in *William Beaumont Hospital*, the dissent's proposed test has a weaker analytical foundation than the Board's established standard, is tilted against Sec. 7 rights, and would be more difficult to apply. Here, as there, we have no difficulty in deciding to adhere to the established standard.

Hotel, supra; *Super K-Mart*, 330 NLRB 263 (1999); and *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003) ("*Mediaone*"). The General Counsel excepts to the judge's findings. As explained below, we reverse in substantial part the judge's dismissals.[4]

1. Rule 12, entitled, "Security of Company Information," instructs employees that:

> You are not permitted to reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons.
>
> Trade secret information including, but not limited to, information on devices, inventions, processes and compilations of information, records, specifications, and information concerning customers, vendors or employees shall not be disclosed, directly or indirectly, or used in any way, either during the term of employment or at any time thereafter, except as required in the course of employment with Schwan. Employees will abide by Schwan's policies and practices as established from time to time for the protection of its trade secret information.
>
> Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction.

Excepting, the General Counsel maintains that the judge erred by failing to find that elements of all three paragraphs of the rule unlawfully prohibit Section 7 activity. The General Counsel emphasizes that the second paragraph restricts the sharing of employee information, while references in the first and third paragraphs to "information in company records" and "Schwan's business" are at least ambiguous as to whether employees may share information about terms and conditions of employment.[5] We agree with the General Counsel that the second and third paragraphs of the rule are unlawful.[6]

a. The prohibition of disclosure of information concerning customers, vendors, or employees in the second paragraph of the rule

We find that employees would reasonably understand the part of the rule restricting disclosure of "information concerning customers, vendors, or employees" to prohibit the sharing of employee information with each other or third parties, including union representatives. The Board has consistently held similar rules forbidding disclosure of information about employees—which includes wages and other terms and conditions of employment—to be overbroad and unlawful. See, e.g., *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012) (rule prohibiting employees from disclosing "personnel information and documents" to persons "outside the organization" unlawful), enfd. 746 F.3d 205 (5th Cir. 2014)[7]; *Cintas Corp.*, 344 NLRB 943, 943 (2005) (prohibition against releasing "any information" about employees unlawful), enfd. 482 F.3d 463 (D.C. Cir. 2007); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 287, 291–292 (1999) (rule prohibiting employees from revealing confidential information about "fellow employees" and discussing work with third parties and the media unlawful).

We reject the judge's finding that employees would reasonably understand this part of the rule, contained in paragraph two, to apply only to confidential proprietary information, which they have no Section 7 right to disclose. Rule 12 lacks any contextual clarity that would lead reasonable employees to conclude that the prohibition is limited to such information. The awkward construction of the paragraph's first sentence defies easy comprehension, but appears to include three separate categories of information, each with its own significance. It begins with three examples of "[t]rade secret information"—"devices, inventions, [and] processes." It then mentions "compilations of information, records, [and]

[4] In its answering brief, the Respondent generally maintains that employees freely and without punishment discuss their wages and working conditions in the workplace and on public websites. It argues that this purported "open culture" negates any possible coerciveness of the rules or the ECONA. We reject this argument. The General Counsel's facial challenges to the rules and the ECONA do not depend on evidence of enforcement. See *Security Walls, LLC*, 356 NLRB 596, 596 fn. 1 (2011); *Lafayette Park Hotel*, supra at 825. Even if the Respondent's evidence of its open culture were relevant, it has failed to establish that this workplace atmosphere communicated to employees that they could exercise the full range of Sec. 7 rights in spite of the prohibitions contained in the rules and the ECONA. In any event, we agree with the judge that the Respondent's supporting evidence was merely anecdotal, and therefore of little value in determining how the Respondent's 7000 employees (at over 400 locations) would interpret its policies.

We also find no support for the Respondent's argument that business considerations generally justify any intrusion of its rules and ECONA on employees' Sec. 7 rights.

[5] The General Counsel also argues more generally that the second paragraph's prohibition of disclosure of "'information concerning customers, vendors or employees', is unlawful."

[6] We agree with the judge's dismissal of the allegation regarding the first paragraph.

[7] Although *Flex Frac Logistics* was decided by a panel that included one or more persons whose appointments to the Board were not valid, see *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the United States Court of Appeals for the Fifth Circuit enforced the Board's Order in *Flex Frac Logistics* prior to the issuance of the Supreme Court's decision in *Noel Canning*. There is no question regarding the validity of the court's judgment. Accordingly, we find it appropriate to rely on *Flex Frac Logistics* in this decision. See *UPMC*, 362 NLRB No. 191, slip op. at 1–2 fn. 5 (2015).

specifications," which refer to the *form* in which information may be kept, not the type of information. The sentence next refers to several types of information seemingly distinct from those listed at the beginning of the sentence—including that "concerning customers, vendors, or employees."

Contrary to the judge and the Respondent, this rule is unclear as to what information is prohibited from disclosure. A portion of the first sentence prohibits employees from disclosing information "concerning . . . employees," which they would reasonably believe includes their terms and conditions of employment. While other portions of this brief paragraph, read together, could be interpreted to apply only to intellectual property and related information, as argued by the Respondent, the inclusion of employee information creates an ambiguity that makes it difficult to ascertain the nature and extent of the information that is barred from disclosure. It is well established that such ambiguity is construed against the Respondent as the drafter of the rule, for employees should not have to decide at their peril what activities a rule prohibits. See *Lafayette Park Hotel*, supra at 828; *Flex Frac Logistics*, supra at 1132. Faced with this ambiguity, and fearing potential discipline, employees would reasonably err on the side of caution and refrain from exercising their Section 7 right to share workplace information.[8]

Mediaone, supra, relied upon by the judge and the Respondent, is distinguishable. The rule there prohibited disclosure of "proprietary information, including *information assets* and *intellectual property*." Id. at 278 (emphasis in original). The lengthy list of "proprietary information" that followed included categories of intellectual assets including business plans, technological research, product documentation, marketing plans, pricing information, copyrighted work, trade secrets, financial information, and patents, as well as the challenged "customer and employee information, including organizational charts and databases." Ibid. In that context, the Board found that considering the rule as a whole, employees would reasonably understand that the rule "was designed to protect the confidentiality of the Respondent's proprietary business information rather than to prohibit discussion of employee wages." Id. at 279. Here, as discussed, the rule is far less clear, and does not establish lawful boundaries on the sharing of information.[9]

b. The prohibition of discussion of Schwan's business in the third paragraph of the rule

We also find the following third paragraph of Rule 12 to be ambiguous and overly broad: "Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction." The broad reference to "Schwan's business" reasonably encompasses any and all facets of employee terms and conditions of employment. The rule prevents discussion of these topics "with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction." The Respondent cannot lawfully limit discussion in this manner, as employees generally have a Section 7 right to share employment-related information with third parties, such as the Board, the media, or union representatives.[10] The reference to "the transaction" at the end of the paragraph reinforces the coerciveness of this part of the rule. "The transaction" presumably refers to sales transactions, which are of central importance to the Respondent's sales employees, who comprise the majority the Respondent's workforce. The details of their transactions with customers have substantial bearing on their terms and conditions of employment, including their commissions and their hours of work.[11] Again, any am-

[8] We also find the rule's near-complete prohibition of disclosure or use of "information concerning customers" to be unlawful. See, e.g., *Boch Honda*, 362 NLRB No. 83, slip op. at 1 fn. 4 (2015). Contrary to our colleague's suggestion, this prohibition clearly would be understood by employees to affect conduct protected by Sec. 7 of the Act. As stated above, most of the Respondent's employees are route sales representatives who sell and deliver the Respondent's products directly to customers. For these employees, "information concerning customers" is inextricably intertwined in many aspects of their work, including their interaction with customers, potential customer complaints about their performance, the length and course of their delivery route, the duration of their workday, their commission-based compensation, and their ability to meet the Respondent's scheduling targets. Our dissenting colleague asserts that "[c]ustomers are not involved in the collective-bargaining process, nor are the terms of an employer's customer relationships subject to the duty to bargain." This assertion misses the mark; the issue is not whether a bargaining obligation exists as to customers but whether the Respondent's sales employees can engage in protected conduct that might involve customer information. Our colleague concedes that "two or more employees may sometimes concertedly engage in NLRA-protected conduct that implicates customer information." But, he nevertheless would find the prohibition lawful, because he speculates that "this is likely to occur in limited circumstances," and "protecting that information will have little, if any, adverse impact on NLRA-protected activity." We disagree. Under the circumstances of this case, we find it clear that Respondent's sales employees would reasonably fear discipline for many kinds of protected workplace discussions concerning their terms and conditions of employment that happen to involve "information concerning customers."

[9] See also *Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007) (similarly distinguishing *Mediaone*); *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3 (2015) (same).

[10] See, e.g., *C.S. Telecom, Inc.*, 336 NLRB 1193, 1193 (2001) (employee engaged in Sec. 7 activity by disclosing information about his work locations to union).

[11] Illustrating the connection between customer transactions and hours of work, Dave Bock, the Respondent's vice president and assis-

biguity is construed against the Respondent. For these reasons, employees would reasonably construe this part of the rule to unlawfully prohibit Section 7 activity.

The Respondent argues that "Schwan's business" refers only to "commercial business transactions with vendors," and that employees would recognize the necessity of protecting this information from competitors. We find no support for this argument. Rule 12 in no way indicates that the third paragraph's reach is limited in that manner. We also disagree with the Respondent that this part of the rule is akin to the rule found lawful in *Super K-Mart*, 330 NLRB at 263–264, which stated that "Company business and documents are confidential," and prohibited "[d]isclosure of such information." Rather, the suggestion in this part of the rule that employees have no right to discuss sales and orders that are the critical elements of their work distinguishes it from the *Super K-Mart* rule, as well as the one in *Lafayette Park Hotel*, supra, that prohibited employees from "[d]ivulging Hotel-private information" to unauthorized parties.

2. Rule 17, entitled, "Use of the Company Name," provides as follows:

> You are not permitted to purchase any material as a charge to the company without authorized management approval.
>
> Any articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated, must be submitted, through your supervisor, for approval or disapproval by the Corporate Communications and Law Departments prior to release.
>
> You are not permitted to negotiate or sign any lease, purchase agreement, bill of sale, contract or other legal document as a representative of the company, unless authorized to do so by management nor are you permitted to express or imply to any vendor the intention of the company to purchase, rent or lease any tangible property, equipment, material, space or services.

We find merit in the General Counsel's exception to the judge's dismissal of the allegation that the second paragraph of this rule is overly broad. Employees have a clear right under the Act to publicize labor disputes. See *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. mem. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed.Appx. 783 (9th Cir. 2009). See generally *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978) (holding that Section 7 protection extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship). The Board has explained that "any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful." *Brunswick Corp.*, 282 NLRB 794, 795 (1987). See also *Trump Marina Casino Resort*, 355 NLRB 585 (2010) (incorporating by reference 354 NLRB 1027, 1027 fn. 2 (2009)) (finding rule requiring employees to get prior authorization before speaking to media unlawful), enfd. mem. 435 Fed.Appx. 1 (D.C. Cir. 2011). The Board has also found rules against employees publicly identifying their employer to be unlawful. See, e.g., *Boch Honda*, supra, 362 NLRB No. 83, slip op. at 2 ("employees would reasonably read the prohibition of using the Respondent's logos 'in any manner' to cover protected employee communications"). By prohibiting employees' dissemination of "any articles, speeches, records of operation, pictures or other material" regarding the Respondent without its permission, the rule contravenes this well-established precedent and is therefore unlawful.

There is no support for the Respondent's view that employees would reasonably conclude that this part of the rule merely prohibits them from speaking on the Respondent's behalf. The second paragraph is worded broadly, requiring, by its terms, preapproval of *any* material intended for publication that mentions the Respondent's name. The fact that it applies only to "publication" of materials is not significant. Even if that term is construed narrowly to apply only to the placement of material in a newspaper or other document of general circulation,[12] it still prohibits employees from, e.g., writing letters to the editor or opinion pieces regarding labor disputes without preapproval. Finally, although the first and third paragraphs of the rule only prohibit actions on behalf of the Respondent, they apply to the purchase or rental of goods and property—actions completely different from the activities addressed in the second paragraph. Thus, we find that employees would reasonably construe the second paragraph of the rule to restrict expression of public statements protected by Section 7.

3. Rule 26, entitled, "Conflicts of Interest," states that:

tant general counsel, testified that RSRs work a "long day," and may at times need to stay overnight in hotels in order to complete all of their scheduled customer visits.

[12] "Publication" may of course reasonably be construed more broadly to include other protected means of communication, such as newsletters, handbills, and social media postings.

> Employees shall avoid activities that could appear to influence their objective decisions relative to their company responsibilities.
>
> Continued employment with the company is dependent upon strict avoidance of:
>
> a. Conflicts of interest or the appearance of such conflicts.
>
> b. Conduct on or off duty which is detrimental to the best interests of the company or its employees.
>
> c. Employees shall avoid activities that might appear to result in fraud or waste.
>
> d. Employees may not engage in any activity, on or off company premises, or be employed in any capacity at Schwan which creates an actual or perceived conflict of interest (e.g. an employee may not supervise an immediate family member or a person with whom they have an intimate relationship; an employee may not have a financial interest in a supplier or competitor).

We agree with the General Counsel that the judge erred by dismissing the allegation that subparagraph (b) is unlawful. Subparagraph (b) broadly applies to *any* conduct that is detrimental to the Respondent's best interests, or those of its employees. Beyond the amorphous reference to "best interests," it contains no examples of conduct that it prohibits, or any language that would confine its reach to misconduct unrelated to Section 7 activity. Rather, it is left to the Respondent's discretion to determine what conduct is unacceptable and – as stated in the rule's introduction—may be grounds for discharge. In these circumstances, a reasonable employee would assume that the Respondent would not consider Section 7 activity such as labor protests or public criticism of its policies to be in its best interests, and might then refrain from engaging in such activity.[13] See *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2 fn. 5 (2014) (unlawful rule prohibited participation "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company").[14]

We disagree with the Respondent and our dissenting colleague that the context of the entire rule renders subparagraph (b) lawful. The surrounding subparagraphs (a), (c), and (d), which are not alleged to be unlawful, together narrowly and specifically address what appear to be legitimate business concerns unrelated to Section 7 activity—conflicts of interest such as fraud, waste, and improper financial or family considerations. The relationship of subparagraph (b) to these concerns—beyond its mere inclusion in the same rule—is attenuated. In sharp contrast to the other parts of the rule, subparagraph (b) does not identify the "conflict of interest" sought to be avoided, other than the ambiguous "best interests of the company or its employees." Nor do we find that a reasonable employee would construe these words as a simple repetition of the specific conflicts of interest mentioned in the rest of Rule 26, rather than having a separate meaning which, as discussed, supra, includes the infringement of their Section 7 rights. Thus, differences in scope and content of the surrounding subparagraphs fail to clarify this part of the rule in the manner suggested by the Respondent.[15]

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[13] The Respondent's "Company Philosophy Towards Labor Unions," located earlier in the handbook, provides additional support for this finding. That provision states that:

> The company is opposed to the unionization of Schwan because the needs of our employees are best served by retaining the ability to converse one-on-one with management, avoiding third party intervention and rewarding employees based on each employee's individual merit.
>
> By remaining union free, the working atmosphere between employees and between employees and management will remain open and honest . . . .

We must also "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

[14] Cases cited by the Respondent in defense of subparagraph (b) are distinguishable. In each case, the rules found lawful were far less broad, and more clearly related to employee misconduct outside the scope of Sec. 7 activity. See *Lafayette Park Hotel*, 326 NLRB at 826-827 (prohibiting "[u]nlawful or improper conduct" that "affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community"); *Flamingo Hilton-Laughlin*, 330 NLRB at 288-289 (prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel"); *Palms Hotel & Casino*, 344 NLRB 1363 (2005) (prohibiting conduct that is "injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons"). In contrast, the rule here is an unqualified and ambiguous restraint on employee behavior.

[15] Our dissenting colleague would read subparagraph (b) as a general, catch-all prohibition of conflicts of interest, "intended to encompass similar conflict-of-interest situations not specifically listed" in subparagraphs (c) and (d), under the canon of construction known as *noscitur a socciis*. Because the Respondent can lawfully prohibit the conduct encompassed by subparagraphs (c) and (d), the dissent contends that subparagraph (b) cannot reasonably be read to encompass different activity that the Respondent cannot lawfully prohibit. However, on this reading, subparagraph (b) serves no function distinct from subparagraph (a), which generally prohibits "Conflicts of interest or the appearance of such conflicts," and which we have found lawful. Applying an equally settled principle of construction, we assume that subparagraph (b) is not superfluous and means what it says. See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall

4. The Respondent requires employees to sign its ECONA when hired, promoted, or otherwise changing jobs within the company. The ECONA includes several sections of rules governing the employment relationship. Section 3 applies to employees' use of so-called "Confidential and Proprietary Information." Subsection (a) of Section 3 in part states that employees will have access to confidential and proprietary information and that "[s]uch information has been developed by Employer at great expense over many years of substantial effort, and were competitors of Employer to obtain such information, there would result a substantial and irreparable adverse effect upon the business of Employer." Subsection (c) defines "Confidential and Proprietary Information [to] include any information pertaining in any way but not limited to" nine distinct categories of information. One of these categories is "any information pertaining to the wages, commissions, performance, or identity of employees of Employer." Under the heading "Restrictions," subsection (d) states that:

> Employee shall neither directly nor indirectly (i) disclose to any person not in the employ of Employer any Confidential or Proprietary Information, or (ii) use any such information to the Employee's benefit, the benefit of any third party or [e]mployer, or to the detriment of Employer, or (iii) use any such information to solicit any employee of Employer to seek employment elsewhere.

Section 2 of the ECONA explains that "compl[iance] with Company's policies and procedures . . . is a condition of continued employment."

We agree with the General Counsel that the ECONA is unlawful because it explicitly restricts disclosing information about "wages, commissions, performance, or identity of employees" to any person not employed by the Respondent. This would include providing such information to third parties such as union representatives—activity clearly protected by Section 7.[16] See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 113–115 (2004) (finding that rule in part prohibiting employees from sharing performance evaluations, salary information, salary grade, and types of pay increases explicitly restricted Sec. 7 rights), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). Having found that this part of the ECONA explicitly restricts such activity under *Lutheran Heritage*, we need not address the judge's finding that employees would reasonably understand the Respondent's intent to be only to prohibit employees from sharing information with its competitors in order to prevent their recruitment away from the Respondent.[17] See *Lutheran Heritage*, 343 NLRB at 646–647. For the same reason, the judge's reliance on *Mediaone*, 340 NLRB at 278–279, is misplaced. As discussed previously, in that case the Board construed the meaning of a prohibition on sharing of "customer and employee information" that was part of a list of intellectual assets. Here, the explicit prohibition on Section 7 activity leaves nothing to construe. "Wages, commissions, performance, or identity of employees" directly relate to employees' terms and conditions of employment, and sharing such information is at the heart of their Section 7 rights.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(1) of the Act by maintaining unlawfully overbroad rules prohibiting: solicitation during nonwork time in work areas; disclosure of information concerning employees, customers, or the Respondent's business; publication of material in which the Respondent's name is mentioned or indicated without the Respondent's approval; conduct that is "detrimental to the best interests of the company or its employees"; and in its Employment, Confidentiality, Ownership & Noncompete Agreement, disclosure of information about the wages, commissions, performance, or identity of employees to anyone not employed by the Respondent. The Respondent has also violated Section 8(a)(1) by maintaining a suspension notice prohibiting suspended employees from discussing their status with anyone inside or outside the company.

be superfluous, void, or insignificant.") (internal quotation marks and citation omitted).

Our colleague correctly observes that Sec. 8(c) of the Act protects, with certain limitations, an employer's expressions of its interest in avoiding union representation of its employees. No part of our Act, however, authorizes an employer to prohibit employees from engaging—on or off duty—in conduct that is in any way detrimental to its interests. Because subparagraph (b), in its full context, requires employees to conform their conduct in all respects to the Respondent's interests, it clearly encompasses protected conduct, and accordingly violates the Act.

[16] We reject the Respondent's argument that the ECONA is not a unilaterally-imposed rule or a condition of employment. The Respondent requires employees to sign the ECONA and comply with it on threat of discharge.

[17] However, we disagree with the judge's finding that the ECONA applies only to disclosures to competitors. While it does allude to the threat of such disclosures, it also expressly prohibits disclosures to "any person" not employed by the company, as well as "any third party," which would include union representatives and the public.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The standard affirmative remedy for maintenance of unlawful work rules is immediate rescission of the offending rules; this remedy ensures that employees may engage in protected activity without fear of being subjected to the unlawful rule. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Pursuant to *Guardsmark*, the Respondent may comply with the Order by rescinding the unlawful handbook rules and republishing its employee handbook without them, and rescinding the unlawful provisions in the Employment, Confidentiality, Ownership & Noncompete Agreement and the suspension notice. We recognize, however, that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will cover the unlawfully worded rules, until it republishes the handbook either without the unlawful provisions or with lawfully worded rules in their stead. Any copies of the handbook that are printed with the unlawful rules must include the inserts before being distributed to employees. Id. at 812 fn. 8.[18]

ORDER

The National Labor Relations Board orders that the Respondent, Schwan's Home Service, Inc., a Wholly Owned Subsidiary of The Schwan Food Company, Loveland, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule in its employee handbook, under the heading "Solicitation and Organizational Work," that prohibits solicitation during nonwork time in work areas.

(b) Maintaining a rule in its employee handbook, under the heading "Security of Company Information," that prohibits the disclosure of information concerning employees, customers, or "Schwan's business."

(c) Maintaining a rule in its employee handbook, under the heading "Use of the Company Name," that requires employees to obtain company approval of any material meant for publication in which the company's name is mentioned or indicated.

(d) Maintaining a rule in the employee handbook, under the heading "Conflicts of Interest," that prohibits employees from engaging in conduct that is "detrimental to the best interests of the company or its employees."

(e) Maintaining a provision in its Employment, Confidentiality, Ownership & Noncompete Agreement (ECONA) that prohibits employees from disclosing information about the wages, commissions, performance, or identity of employees to anyone not employed by the company.

(f) Maintaining language in its standard suspension notice that prohibits employees from discussing their status with anyone, inside or outside the company, during periods of disciplinary suspension or when they are suspended pending investigation.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule in its employee handbook, under the heading "Solicitation and Organizational Work," that prohibits solicitation during nonwork time in work areas.

(b) Rescind the rule in its employee handbook, under the heading "Security of Company Information," that prohibits disclosure of information concerning employees, customers, or "Schwan's business."

(c) Rescind the rule in its employee handbook, under the heading "Use of the Company Name," that requires employees to obtain company approval of any material meant for publication in which the company's name is mentioned or indicated.

(d) Rescind the rule in its employee handbook, under the heading "Conflicts of Interest," that prohibits employees from engaging in conduct that is "detrimental to the best interests of the company or its employees."

(e) Furnish all current employees nationwide with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

(f) Rescind the provision in its ECONA that prohibits employees from disclosing information about the wages, commissions, performance, or identity of employees to anyone not employed by the company, and notify employees in writing that this has been done and that the provision is no longer in force.

(g) Rescind the language in its standard suspension notice that prohibits employees from discussing their status with anyone, inside or outside the company, during peri-

[18] Because the Respondent maintained its overbroad rules on a companywide basis, we agree with the judge that the notices are to be posted nationwide. *Guardsmark, LLC*, 344 NLRB at 812.

ods of disciplinary suspension or when they are suspended pending investigation, and notify employees in writing that this has been done and that the provision is no longer in force.

(h) Within 14 days after service by the Region, post at its facilities nationwide copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 13, 2011.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 10, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent, Schwan's Home Service, Inc. (Schwan's), violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining certain work rules. The work rules at issue here are facially neutral: they do not explicitly restrict NLRA-protected conduct, there is no evidence that they were adopted in response to NLRA-protected conduct, nor were they applied to restrict NLRA-protected conduct that had occurred. Nonetheless, my colleagues rely on the "reasonably construe" test articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (*Lutheran Heritage*), which requires a finding that facially neutral work rules violate the Act if they would be reasonably construed by employees to prohibit some type of future potential NLRA-protected activity. I respectfully disagree with the majority in three respects.

First, I believe the *Lutheran Heritage* "reasonably construe" standard should be overruled by the Board or repudiated by the courts for the reasons set forth in my dissenting opinion in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, dissenting).

Second, I believe the Board is required to evaluate the rules at issue in this case by striking a "proper balance" that takes into account (i) the legitimate justifications associated with the disputed rules and (ii) any potential adverse impact on NLRA-protected activity.[1] Based on this balancing—which the Supreme Court has repeatedly required from the Board, and which is consistent with Board decisions spanning more than 60 years[2]—I concur with my colleagues' finding that Respondent violated the Act by maintaining (i) the portions of Rule 12, "Security of Company Information," that prohibit disclosure "directly or indirectly" of "information concerning . . . employees," that prohibit the use of such information "in any way . . . during the term of employment or at any time thereafter," and that prohibit the discussion of

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"). In performing the balancing discussed in the text, I believe the Board must also take into account other considerations, which may involve, depending on the case, reasonable distinctions between types of rules and justifications, evidence regarding the particular industry or work setting, specific events that may bear on the disputed rule, and the possibility that the rule may be lawfully maintained even though future application of the rule against NLRA-protected conduct may be unlawful. See Discussion, part B infra. See also *William Beaumont*, supra, slip op. at 15, 18–20 (Member Miscimarra, concurring in part and dissenting in part).

[2] *Great Dane*, supra, 388 U.S. at 33–34; *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963). See generally *William Beaumont*, supra, slip op. at 11–13, 18–21 (Member Miscimarra, concurring in part and dissenting in part).

"Schwan's business . . . with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction"; (ii) the portion of Rule 17, "Use of the Company Name," that prohibits all "material for publication," unless submitted for approval or disapproval, in which "the company name is mentioned or indicated"; and (iii) the portion of Respondent's Employment, Confidentiality, Ownership & Noncompete Agreement that prohibits disclosure of "any information pertaining to the wages, commissions, performance, or identity of employees of Employer." However, I respectfully dissent from my colleagues' finding that the Respondent violated the Act by maintaining other aspects of Rule 12, and I dissent from their finding that the Respondent unlawfully maintained Rule 26, "Conflicts of Interest."

Third, even if one applies *Lutheran Heritage*, I disagree with the majority's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining the portions of Rule 12 that I believe are lawful (i.e., excluding the violations described above). I likewise disagree that *Lutheran Heritage* supports a finding that the Respondent violated Section 8(a)(1) by maintaining Rule 26, "Conflicts of Interest."

Background

The Respondent has maintained a "Schwan Food Company Employee Handbook" that contains three work rules at issue in this case.

Rule 12, captioned, "Security of Company Information," states:

> You are *not permitted to reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons.*
>
> *Trade secret information including, but not limited to, information on devices, inventions, processes and compilations of information, records, specifications, and information concerning customers, vendors or employees shall not be disclosed, directly or indirectly, or used in any way, either during the term of employment or at any time thereafter, except as required in the course of employment with Schwan.* Employees will abide by Schwan's policies and practices as established from time to time for the protection of its trade secret information.
>
> *Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction.*[3]

Rule 17, captioned, "Use of the Company Name," states:

> You are not permitted to purchase any material as a charge to the company without authorized management approval.
>
> *Any articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated, must be submitted, through your supervisor, for approval or disapproval by the Corporate Communications and Law Departments prior to release.*
>
> You are not permitted to negotiate or sign any lease, purchase agreement, bill of sale, contract or other legal document as a representative of the company, unless authorized to do so by management nor are you permitted to express or imply to any vendor the intention of the company to purchase, rent or lease any tangible property, equipment, material, space or services.[4]

Rule 26, captioned, "Conflicts of Interests," states:

> Employees shall avoid activities that could appear to influence their objective decisions relative to their company responsibilities. *Continued employment with the company is dependent upon strict avoidance of:*
>
> a. Conflicts of interest or the appearance of such conflicts.
>
> b. *Conduct on or off duty which is detrimental to the best interests of the company or its employees.*
>
> c. Employees shall avoid activities that might appear to result in fraud or waste.
>
> d. Employees may not engage in any activity, on or off company premises, or be employed in any capacity at Schwan which creates an actual or perceived conflict of interest (e.g. an employee may not supervise an immediate family member or a person with whom they have an intimate relationship; an employee may not have a financial interest in a supplier or competitor).
>
> Please contact your local Human Resource representative for specifics on how the employment of relatives is handled in your facility.

None of the above rules explicitly restricts activities protected under Section 7 of the Act, and there is no evidence that the rules were adopted in response to protected conduct or applied to restrict protected activities.

The judge found that all the above rules were lawful, based on the following analysis:

[3] Emphasis added.

[4] Emphasis added.

> I conclude that an employee reading these rules *would reasonably understand that the rules were designed to protect and insulate the Respondent from situations which would compromise its financial, trade secret, brand name and other proprietary interests* including the "good will" associated with the Respondent's brand name and the acquiring and retention of customers which could be adversely affected by inappropriate employee conduct "on or off duty." I do not believe the rules, singly or collectively, *even though they prohibit disclosure of information regarding employees and also prohibit certain employee conduct*, would reasonably cause this Respondent's employees to refrain from protected activity under the Act. I shall dismiss these allegations of the complaint.[5]

In addition, the Respondent also utilizes an Employment, Confidentiality, Ownership & Noncompete Agreement ("Noncompete Agreement" or "ECONA"), portions of which are also at issue here. The Noncompete Agreement contains a section entitled "Confidential and Proprietary Information; Ownership and Assignment of Rights," which states in part:

> a. Stipulations. Employer and Employee agree that during the course of Employee's employment, Employee will have access to Confidential and Proprietary Information as defined below. Such information has been developed by Employer at great expense over many years of substantial effort, and were competitors of Employer to obtain such information, there would result a substantial and irreparable adverse effect upon the business of Employer. Employee agrees that the Employer owns all such Confidential and Proprietary Information.
>
> b. Definition. As used in this Agreement, Confidential and Proprietary Information is understood to mean information in whatever form, tangible or intangible, pertaining in any manner to the sales, manufacture, or distribution business of or product or intellectual property development by Employer where such information has been developed by employees, consultants, or agents of Employer or otherwise at Employer's expense, and which is not generally known in the industry in which Employer is involved and gives Employer a competitive advantage.
>
> c. Scope. Confidential and Proprietary Information shall include any information pertaining in any way but not limited to (i) any contract or lease involving Employer and any individual, organization or other entity; (ii) Employer's cost and prices for its merchandise, products, or services, as well as Employer's pricing and costing procedures, purchasing or accounting systems or techniques, financial performance or business systems; . . . (vi) any information not publicly available pertaining to the customers or potential customers of Employer including, without limitation, the identity of Employer's customers or potential customers; (vii) *any information pertaining to the wages, commissions, performance, or identity of employees of Employer*. . . .
>
> d. Restrictions. Employee shall neither directly nor indirectly (i) *disclose to any person not in the employ of Employer* any Confidential or Proprietary Information, or (ii) *use any such information to the Employee's benefit, the benefit of any third party or [e]mployer,*[6] *or to the detriment of Employer*, or (iii) use any such information to solicit any employee of Employer to seek employment elsewhere.

The judge upheld the legality of the Noncompete Agreement's confidentiality provisions, which he interpreted as follows:

> I conclude that employees entering into the Agreement, who make the effort to read through it, *would reasonably understand that the Respondent in this portion of the Agreement is concerned with, and is attempting to prohibit the route sales representatives from disclosing, "confidential and proprietary" information to the Respondent's "competitors,"* and that this is the thrust, import and intent of this section of the Agreement. The Respondent has *legitimate concerns that its route sales representatives could be more easily recruited away from the Respondent by competitors if competitors became aware of the identity, performance skills, and earnings of particular route sales representatives. Accordingly, I find that employees would not reasonably read this rule as prohibiting Section 7 activity.*[7]

My colleagues apply the *Lutheran Heritage* "reasonably construe" standard and, contrary to the judge, they conclude that all the italicized portions of the above rules—with one exception[8]—violate Section 8(a)(1) of the Act.

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[5] Judge's decision, infra, slip op. at 24 (emphasis added) (citing *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); *Super K-Mart*, 330 NLRB 263 (1999); and *Mediaone of Greater Florida*, 340 NLRB 277 (2003)).

[6] The Noncompete Agreement capitalizes "Employer" here. Thus, as written, the Noncompete Agreement prohibits employees from using the Employer's Confidential or Proprietary Information "to . . . the benefit of . . . Employer." This must have been an inadvertent mistake.

[7] Judge's decision, supra, slip op. at 24 (emphasis added) (citing *Mediaone of Greater Florida*, supra, 340 NLRB at 279).

[8] My colleagues find that Respondent did not violate Sec. 8(a)(1) by maintaining par. 1 in Rule 12, which states: "You are not permitted to

The majority finds that Rule 12, "Security of Company Information," "defies easy comprehension" and is "unclear as to what information is prohibited from disclosure," especially the "trade secret" paragraph that, in part, prohibits the disclosure of information "concerning . . . employees." In particular, the majority relies on the following considerations:

- My colleagues find that the nondisclosure obligation regarding "information concerning . . . employees" would prompt employees to "reasonably believe" they cannot have discussions with other employees about "their terms and conditions of employment."
- My colleagues concede that "other portions [of Rule 12] . . . could be interpreted to apply only to intellectual property and related information," but they find that (i) "the inclusion of employee information creates an ambiguity that makes it difficult to ascertain the nature and extent of the information that is barred from disclosure," (ii) "such ambiguity is construed against the Respondent as the drafter of the rule, for employees should not have to decide at their peril what activities a rule prohibits," and (iii) "[f]aced with this ambiguity, and fearing potential discipline, employees would reasonably err on the side of caution and refrain from exercising their Section 7 right to share workplace information."[9]
- My colleagues find the nondisclosure requirement regarding "Schwan's business" unlawful because, in their view, the phrase "Schwan's business" reasonably encompasses "any and all facets of employee terms and conditions of employment."
- The majority also finds that prohibiting disclosures regarding "the transaction" reinforces "the coerciveness of this part of the rule" because sales transactions "are of central importance to the Respondent's sales employees, who comprise the majority of the Respondent's workforce," and the "details of their transactions with customers have substantial bearing on their terms and conditions of employment, including their commissions and their hours of work." Again invoking the principle that "any ambiguity is construed against the Respondent," my colleagues find that "employees would reasonably construe this part of the rule to unlawfully prohibit Section 7 activity."

My colleagues likewise find that the Respondent unlawfully maintained Rule 17, "Use of the Company Name," because employees "have a clear right under the Act to publicize labor disputes," and "employees would reasonably construe the second paragraph of the rule to restrict expression of public statements protected by Section 7."

Turning to Rule 26, my colleagues find that Respondent violated the Act by prohibiting employees from engaging in "[c]onduct on or off duty which is detrimental to the best interests of the company or its employees." They conclude that this rule unlawfully interferes with NLRA-protected activities because it "broadly applies to *any* conduct that is detrimental to the Respondent's best interests, or those of its employees." My colleagues also observe:

> Beyond the amorphous reference to "best interests," [Rule 26] *contains no examples of conduct that it prohibits*, or any language *that would confine its reach to misconduct unrelated to Section 7 activity*. Rather, it is left to the Respondent's discretion to determine what conduct is unacceptable and–as stated in the rule's introduction–may be grounds for discharge. In these cir-

reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons." I concur with the finding that this provision is lawful. However, consistent with my separate opinion in *William Beaumont*, supra, I reach this conclusion because the Respondent has legitimate confidentiality interests associated with this rule, and a nondisclosure requirement limited to "company records" and "information in company records" cannot reasonably be regarded as having an adverse impact on Sec. 7 activity. See *Super K-Mart,* 330 NLRB at 263–264 (employees have no Sec. 7 right to disseminate an employer's own records, and any potential impact on Sec. 7 rights is outweighed by the employer's legitimate interest in protecting the confidentiality of its private business information).

[9] Citing *Boch Honda*, 362 NLRB No. 83, slip op. at 1 fn. 4 (2015), my colleagues also find "the rule's near-complete prohibition of disclosure or use of 'information concerning customers' to be unlawful." The Board in *Boch Honda* furnished no explanation why it found a similar rule unlawful. However, my colleagues find that employees would "clearly" understand a prohibition on the disclosure of "information concerning customers" to "affect" Sec. 7 activity, since "'information concerning customers' is inextricably intertwined in many aspects of their work, including their interaction with customers, potential customer complaints about their performance, the length and course of their delivery route, the duration of their workday, their commission-based compensation, and their ability to meet the Respondent's scheduling targets." As explained below, I believe it strains credulity to find that employees would reasonably construe the prohibition on disclosing "information concerning customers" in this manner. In my view, this is an interpretation that would only be adopted by labor lawyers and only if their sole focus is the NLRA, which highlights one of the principal reasons that the *Lutheran Heritage* "reasonably construe" standard should be overruled. See Discussion, part A, infra.

> cumstances, *a reasonable employee would assume that the Respondent would not consider Section 7 activity such as labor protests or public criticism of its policies to be in its best interests*, and might then refrain from engaging in such activity.[10]

Finally, my colleagues conclude that the Noncompete Agreement's confidentiality provisions (regarding "information pertaining to the wages, commissions, performance, or identity of employees of Employer") violate Section 8(a)(1) of the Act because they explicitly restrict NLRA-protected conduct.[11] Here, my colleagues state that the Noncompete Agreement "explicitly restricts disclosing [employee] information . . . to any person not employed by the Respondent," which would include "third parties such as union representatives—activity clearly protected by Section 7." My colleagues observe that "'[w]ages, commissions, performance, or identity of employees' directly relate to employees' terms and conditions of employment, and sharing such information is at the heart of their Section 7 rights."

Discussion

A. The Board's Lutheran Heritage "Reasonably Construe" Test Should Be Overruled by the Board or Repudiated by the Courts

The primary problem with my colleagues' evaluation of Respondent's rules stems from their reliance on *Lutheran Heritage*, under which all facially neutral employment policies, work rules and handbook provisions violate NLRA Section 8(a)(1) if employees would "reasonably construe the language to prohibit Section 7 activity."[12] Under the "reasonably construe" standard, offending work rules are deemed unlawful even though they are facially neutral, i.e., they do not explicitly restrict Section 7 activity, they were not adopted in response to NLRA-protected activity, and they have not been applied to restrict NLRA-protected activity.

For reasons described at length in my partial dissenting opinion in *William Beaumont*,[13] I believe that the *Lutheran Heritage* "reasonably construe" test should be overruled by the Board or repudiated by the courts. The "reasonably construe" standard defies common sense and is contrary to the Act in numerous respects. Although Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the *exercise* of the rights guaranteed in section 7," the instant case does not involve *any* "exercise" of NLRA-protected rights, and—as noted above—the disputed work rules do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity. The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights—even though the risk of intruding on NLRA rights might be "comparatively slight"[14]—without taking into account the many legitimate justifications associated with particular policies, rules and handbook provisions, which may affect matters involving life and death, the avoidance of fatal accidents, reducing the risk of workplace violence, and preventing unlawful workplace harassment. As I explained in *William Beaumont*:

> - *Lutheran Heritage* is contrary to the Supreme Court precedent establishing that, whenever work requirements are alleged to violate the NLRA, the Board *must* give substantial consideration to the justifications associated with the rule, rather than only considering a rule's potential adverse effect on NLRA rights.[15]

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[10] Emphasis added; fn. omitted.

[11] Under *Lutheran Heritage*, the "reasonably construe" test applies to facially neutral requirements that, among other things, do *not* explicitly restrict Section 7 activity. See *William Beaumont*, supra, slip op. at 7 fn. 3 (Member Miscimarra, concurring in part and dissenting in part). Under my colleagues' analysis, the Noncompete Agreement's confidentiality provision *does* explicitly restrict Sec. 7 activity—for example, concerted protected conduct by two or more employees relating to wages and commissions—and thus would directly interfere with, restrain, or coerce employees in the exercise of protected rights in violation of Sec. 8(a)(1).

[12] *Lutheran Heritage*, supra, 343 NLRB at 647. This standard is sometimes called *Lutheran Heritage* "prong one" because, in *Lutheran Heritage*, the "reasonably construe" test is enumerated as the first item, or "prong," in a three-prong standard for determining whether a challenged policy, work rule or handbook provision that does not explicitly restrict Sec. 7 activity is nonetheless unlawful. See *William Beaumont*, supra, slip op. at 7 fn. 3 (Member Miscimarra, concurring in part and dissenting in part).

[13] *William Beaumont*, supra, slip op. at 8–10, 11–18 (Member Miscimarra, concurring in part and dissenting in part).

[14] *Great Dane*, supra, 388 U.S. at 34.

[15] See *Republic Aviation Corp. v. NLRB*, supra, 324 U.S. at 797–798 (describing the need to balance the "undisputed right of self-organization assured to employees" and "the equally undisputed right of employers to maintain discipline in their establishments," rights that "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee," because the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society"); *NLRB v. Erie Resistor Corp.*, supra, 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); *Great Dane*, supra, 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of

- *Lutheran Heritage* is contradicted by the NLRB's own cases establishing that numerous work requirements and restrictions are lawful—for example, no-solicitation and no-distribution rules, off-duty employee access rules, "just cause" provisions and attendance requirements—notwithstanding the fact that each would fail the *Lutheran Heritage* "reasonably construe" test.[16]

- The Board has engaged in a balancing of competing interests—in the above cases and others spanning more than six decades—*without* disregarding the justifications associated with particular rules and requirements.[17]

- Under *Lutheran Heritage*, the Board has invalidated many facially neutral work rules merely because they are ambiguous. However, the Board's requirement of linguistic precision when applying *Lutheran Heritage* is contrary to the permissive treatment that Congress, the Board and the courts have afforded to "just cause" provisions, benefit plans, and other employment-related requirements throughout the Act's history.[18] Moreover, given that many ambiguities are inherent in the NLRA itself, it is unreasonable to find that reasonable work requirements violate the NLRA merely because employers cannot discharge the impossible task of anticipating and carving out every possible overlap with some potential NLRA-protected activity.

- The *Lutheran Heritage* "reasonably construe" test stems from several false premises that are contrary to the NLRA, the most important of which is a misguided belief that unless employers formulate written policies, rules and handbooks that can never be construed in a manner that conflicts with some type of hypothetical NLRA protection, employees are best served by not having employment policies, rules and handbooks at all. In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good.[19]

- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's discretion, contrary to the Board's responsibility to apply the "general provisions of the Act to the complexities of industrial life."[20] It does not permit the Board to afford greater protection to those Section 7 activities that are central to the Act (as compared to other types of activity may lie at the periphery of the Act or rarely if ever occur), to make reasonable distinctions among different types of justifications underlying particular rules, or to differentiate between different industries, work settings, and discrete events that, if considered, may demonstrate that the justifications for certain work requirements outweigh their potential impact on some type of NLRA-protected activity.[21]

- If a particular work rule exists for important reasons that require the Board to conclude "the rule on its face is *not* unlawful,"[22] *Lutheran Heritage* fails to recognize that the Board may later find that the employer violates Section 8(a)(1) if it *applies* the rule to restrict NLRA-protected activity.[23] Here as

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the Act and its policy"); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."). See generally *William Beaumont*, supra, slip op. at 11–12 (Member Miscimarra, concurring in part and dissenting in part).

[16] See *William Beaumont*, supra, slip op. at 12 (Member Miscimarra, concurring in part and dissenting in part).

[17] Id., slip op. at 12–13, 20–21 (Member Miscimarra, concurring in part and dissenting in part).

[18] Id., slip op. at 8, 13–14 & fns. 29–31 (Member Miscimarra, concurring in part and dissenting in part).

[19] Id., slip op. at 8, 13–15 (Member Miscimarra, concurring in part and dissenting in part).

[20] *NLRB v. Erie Resistor Corp.*, supra, 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[21] See *William Beaumont*, supra, slip op. at 9, 15 (Member Miscimarra, concurring in part and dissenting in part).

[22] *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) (emphasis added).

[23] In *Aroostook County Regional Ophthalmology Center*, the Court of Appeals for the D.C. Circuit stated:

> In the absence of any evidence that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, the

well, *Lutheran Heritage* prevents the Board from discharging its duty to apply the "general provisions of the Act to the complexities of industrial life."[24]

- The *Lutheran Heritage* "reasonably construe" test has been exceptionally difficult to apply, many Board decisions have disregarded important qualifications set forth in *Lutheran Heritage* itself,[25] and it has consistently produced arbitrary results.[26]

As I stated in *William Beaumont*, our experience with the *Lutheran Heritage* "reasonably construe" standard "has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions."[27] For the above reasons, *Lutheran Heritage* should be overruled by the Board, and if not, it should be repudiated by the courts.

B. Properly Balancing NLRA Rights and Relevant Justifications, Portions of Rules 12 and 17 and the Noncompete Agreement Violate the Act, and All Other Disputed Provisions Are Lawful

In cases that involve the assessment of facially neutral employment policies, work rules or handbook provisions, I believe the Board is required to do what the Supreme Court has repeatedly required of us, which is to carry out our "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."[28] Consistent with this requirement, I believe the Board may find that facially neutral work requirements are unlawful only if the Board considers two things—the justifications associated with a particular policy, work rule or handbook provision, and its potential impact on NLRA-protected conduct—and only if the Board reasonably finds that the justifications are outweighed by an adverse impact on Section 7 activity. As noted previously, when engaging in this balancing, I believe the Board is required to consider other potentially relevant factors, depending on the case, including possible distinctions between and among different NLRA-protected activities, different types of rules, and different justifications; potential differences relating to particular industries and work settings; and discrete events that bear on particular disputed policies, work rules and handbook provisions. The Board must also recognize that these considerations may warrant a conclusion that "the rule on its face is *not* unlawful,"[29] even though the Board may later find it is unlawful to *apply* the rule in a manner that restricts NLRA-protected activity.[30]

Based on a balancing of justifications and NLRA rights, I concur with my colleagues' finding that Respondent violated the Act by maintaining (i) the portions of Rule 12, "Security of Company Information," that prohibit disclosure "directly or indirectly" of "information concerning . . . employees," that prohibit the use of such information "in any way . . . during the term of employment or at any time thereafter," and that prohibit

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Board's determination to the contrary is unjustified. If an occasion arises where [the employer] is attempting to use the rule as the basis for imposing questionable restrictions upon employees' communications, the employees may seek review of the Company's actions at that time. However, the rule on its face is not unlawful.

Ibid. See also *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) (stating that the Board cannot find a facially neutral policy unlawful based upon "fanciful" speculation, and the Board must "consider the context in which the rule was applied and its actual impact on employees"). See *William Beaumont*, supra, slip op. at 19–20 & fn. 60 (Member Miscimarra, concurring in part and dissenting in part).

[24] *NLRB v. Erie Resistor Corp.*, supra, 373 U.S. at 236; *NLRB v. J. Weingarten, Inc.*, supra, 420 U.S. at 266–267. See generally *William Beaumont*, supra, slip op. at 9 (Member Miscimarra, concurring in part and dissenting in part).

[25] See *William Beaumont*, supra, slip op. at 13–14 fn. 29; id., slip op. at 18 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[26] Compare *Adtranz ABB Daimler-Benz Transportation v. NLRB*, supra, 253 F.3d at 27 (finding it *lawful* to maintain rule prohibiting "abusive or threatening language to anyone on [c]ompany premises") and *Lutheran Heritage*, supra, 343 NLRB at 646–647 (finding it *lawful* to maintain rule prohibiting "abusive or profane language") with *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding it *unlawful* to maintain rule prohibiting "loud, abusive or foul language"). Also compare *Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (finding it *lawful* to maintain rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees) with *Lafayette Park Hotel*, 326 NLRB at 825 (1998). See generally *William Beaumont*, supra, slip op. at 15–18 (Member Miscimarra, concurring in part and dissenting in part).

In part, the arbitrary results associated with *Lutheran Heritage* have resulted from many Board decisions that have disregarded important qualifications set forth in *Lutheran Heritage* itself. See *William Beaumont*, supra, slip op. at 18 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[27] *William Beaumont*, supra, slip op. at 18 (Member Miscimarra, concurring in part and dissenting in part).

[28] *NLRB v. Great Dane Trailers, Inc.*, supra, 388 U.S. at 33–34 (emphasis added). See also *NLRB v. Erie Resistor Corp.*, supra, 373 U.S. at 229 (quoted in fn., supra); *Republic Aviation v. NLRB*, supra, 324 U.S. at 797–798 (quoted in fn., supra).

[29] *Aroostook County Regional Ophthalmology Center v. NLRB*, supra, 81 F.3d at 213 (emphasis added).

[30] *Aroostook County Regional Ophthalmology Center*, supra; *Adtranz ABB Daimler-Benz Transportation v. NLRB*, supra, 253 F.3d at 28. See generally *William Beaumont*, supra, slip op. at 19–20 & fn. 60 (Member Miscimarra, concurring in part and dissenting in part).

the discussion of "Schwan's business . . . with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction"; (ii) the portion of Rule 17, "Use of the Company Name," that prohibits all "material for publication" (unless submitted for approval or disapproval) in which "the company name is mentioned or indicated"; and (iii) language in the Noncompete Agreement that prohibits disclosure or use of "any information pertaining to the wages, commissions, performance, or identity of employees." However, I respectfully dissent from my colleagues' finding that Respondent violated the Act by maintaining other aspects of Rule 12; I dissent from the finding that Respondent unlawfully maintained Rule 26, "Conflicts of Interest"; and although I agree that Respondent violated Section 8(a)(1) by maintaining the requirement in the Noncompete Agreement that employee information be kept confidential, I disagree with my colleagues' finding that this provision explicitly restricts NLRA-protected activity.

1. *Rule 12 ("Security of Company Information").* Paragraph 2 of Rule 12 states that "[t]rade secret information including . . . *information concerning customers, vendors, or employees shall not be disclosed, directly or indirectly*, or *used in any way*, either *during the term of employment or at any time thereafter*, except as required in the course of employment with Schwan" (emphasis added). Rule 12, paragraph 3 states that "Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction."

I agree with the majority that the portion of Rule 12, paragraph 2 stating that "information concerning . . . employees shall not be disclosed, directly or indirectly" or "used in any way" interferes with NLRA-protected rights in violation of Section 8(a)(1). Certainly, as the judge recognized, the Respondent has a legitimate interest in "protect[ing] and insulat[ing] the Respondent from situations which would compromise its financial, trade secret, brand name and other proprietary interests," which would include, for example, situations that would expose employment-related information to competitors. It is also possible, as the judge found, that "even though [the rules] prohibit disclosure of information regarding employees," Rule 12 would not "reasonably cause this Respondent's employees to refrain from protected activity under the Act."[31] However, as noted above, I believe the Board should evaluate whether the legitimate justifications associated with this aspect of Rule 12 are outweighed by the rule's impact on Section 7 activity. Notwithstanding Respondent's interest in preventing competitors from obtaining "information concerning . . . employees," this interest is outweighed by the impact of the rule on Section 7 activity. This is apparent from the breadth of the prohibition: employees are broadly prohibited from disclosing or using *any* "information concerning . . . employees." Indeed, the rule prohibits disclosure of employee information "in any way" and whether accomplished "directly or indirectly." These phrases preclude any reasonable finding that, in view of its limited purpose, Rule 12 contemplates that employees *may* disclose and use "information concerning . . . employees" where doing so would be protected under the NLRA. Not only is the disclosure and use of information about employees central to many or most types of Section 7 activity, it is hard to fathom how *any* Section 7 activity can be conducted by Respondent's employees without having employee-related information "disclosed" or "used" in some manner. See *Victory Casino Cruises II*, 363 NLRB No. 167, slip op. at 8–9 (2016) (Member Miscimarra, concurring in part and dissenting in part).[32] The scope of Respondent's prohibition would severely impede, if not entirely preclude, most types of NLRA-protected activity by its employees, and Respondent—although justified in protecting itself against employee-related disclosures that would present competitive threats—has not identified any interest that justifies the scope of this prohibition. For this reason, I concur in my colleagues' finding that Rule 12's prohibition on disclosing or using "information concerning . . . employees" unlawfully interferes with, restrains or coerces employ-

[31] The judge's analysis of Rule 12—specifically, his finding that the nondisclosure requirement applicable to "information concerning . . . employees" would not reasonably cause "this Respondent's employees to refrain from protected activity"—highlights one of the problems with the *Lutheran Heritage* "reasonably construe" test: it invites speculation regarding how an employee would "reasonably construe" particular language, which prompted the judge to disregard the fact that Rule 12 plainly prohibits employees from disclosing or using information about other employees—activities that are central to many if not most types of NLRA-protected activity.

[32] See also *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. mem. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009):

> The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. This includes communications about labor disputes to newspaper reporters.

See also *MCPc, Inc.*, 360 NLRB No. 39, slip op. at 1 fn. 4 (2014) (Member Miscimarra, concurring) (finding unlawful a confidentiality rule preventing the disclosure of "personal or financial information" because it would prohibit protected discussions concerning compensation without other important justifications).

ees in the exercise of the rights guaranteed in Section 7, and therefore violates Section 8(a)(1) of the Act.

Similarly, I concur with my colleagues' finding that Rule 12, paragraph 3 violates Section 8(a)(1). This portion of Rule 12 states that "Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction." Here as well, I believe the Respondent clearly has the right to protect its trade secrets and proprietary information from disclosure, and work requirements reasonably calculated to provide such protection would typically be supported by justifications that outweigh any incidental adverse impact on potential Section 7 activity. However, Rule 12's prohibition against discussing "Schwan's business" is extremely broad in its scope: although this provision is not a model of clarity, it arguably means employees cannot discuss any transaction-related aspects of "Schwan's business" even with other employees (who lack a "direct association with the transaction"), and it prohibits discussions of all other aspects of "Schwan's business" with any non-employees. Again, this prohibition would likely preclude most types of NLRA-protected activity; and although Respondent is justified in attempting to protect many aspects of "Schwan's business," it has not identified any interest that justifies the scope of this prohibition.

I respectfully disagree, however, with the majority's finding that Paragraph 2 of Rule 12 also violates the Act by restricting the disclosure of "information concerning customers." Section 1 of the Act states the Act's purpose of "encouraging the practice and procedure of collective bargaining." Customers are not involved in the collective-bargaining process, nor are the terms of an employer's customer relationships subject to the duty to bargain.[33] Conversely, Respondent clearly has substantial justifications for protecting customer information from disclosure. Customer information may include records of past purchases, which may affect an employer's decisions concerning inventory and marketing, among other things. Customers also routinely provide businesses, including the Respondent, with their personal information, such as credit card numbers, with the reasonable expectation that the business will protect that information and only use it for the purpose for which it was provided. Employers have a compelling interest in prohibiting the disclosure of such information to protect their business reputation and avoid significant legal liability.[34]

Although two or more employees may sometimes concertedly engage in NLRA-protected conduct that implicates customer information, I believe this is likely to occur in limited circumstances, and in such cases, I believe the Board can independently address whether *applying* Rule 12 against such conduct violates Section 8(a)(1). Certainly, no such circumstances are reflected in the record here. The Respondent has a legitimate business justification for protecting customer information, and protecting that information will have little, if any, adverse impact on NLRA-protected activity. I therefore respectfully dissent from my colleagues' finding that Rule 12's prohibition on the sharing of customer information is unlawful.

2. *Rule 17 ("Use of the Company Name").* Rule 17 requires employees to seek permission from a supervisor before "publication" of any material "in which the company name is mentioned or indicated." The Respondent argues the purpose of the rule is not to prevent employees from speaking *about* the Respondent, but to prevent employees from speaking *for* the Respondent without authorization. I agree that Respondent has a legitimate and substantial interest in ensuring that only those individuals it has authorized to speak on its behalf do so. But Rule 17 sweeps much more broadly than is necessary to achieve this limited purpose. For example, Rule 17 does not limit the definition of "publication," and therefore (as my colleagues point out) the "supervisory permission" requirement applies to all types of publication, which may include letters to the editor, opinion pieces concerning labor disputes, newsletters, handbills, and social media postings.[35] Moreover, public statements by employees about the workplace are central to the exercise of employee rights under the Act, *Valley Hospital Medical Center*, 351 NLRB at 1252, as are social media postings by employees to one another. Requiring employees to obtain permission from "Corporate Communications and Law Departments" before publishing any and every type of "material" in which "the com-

[33] See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Justice Stewart, concurring) ("Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with the employees' bargaining representative.").

[34] For example, as of January 31, 2015, Target had incurred net cumulative expenses of $162 million as a result of a data breach involving customer information. See https://www.sec.gov/Archives/edgar/data/27419/000002741915000012/tgt-20150131x10k.htm.

[35] The breadth of Rule 17 is made clear when one considers the definitions of relevant terms. *Publication* means "the act or process of publishing," http://www.merriam-webster.com/dictionary/publication, and *publish* means "to make generally known" or "to make public announcement of," http://www.merriam-webster.com/dictionary/publish. Thus, any means of making something generally known qualifies as "publication."

pany name is mentioned or indicated" would substantially impede a broad array of Section 7 activities, give Respondent the right to veto such activities, and provide an effective means by which the Respondent could engage in surveillance of such activity. I believe the adverse impact of Rule 17 on NLRA-protected activity is substantial, and Respondent has not articulated a justification that explains the breadth of its prohibition. Therefore, I concur with my colleagues' finding that the second paragraph of Rule 17 is unlawful.

3. *The Noncompete Agreement.* As noted previously, Respondent's Noncompete Agreement defines "Confidential and Proprietary Information" and states broadly that the employee shall "neither directly nor indirectly . . . disclose" such information "to any person not in the employ of Employer" or "use any such information to the Employee's benefit, [to] the benefit of any third party or [e]mployer, or to the detriment of Employer." Included in the Respondent's definition of "Confidential and Proprietary Information" is "any information pertaining to the *wages, commissions, performance, or identity of employees* of Employer" (emphasis added).

I agree with my colleagues that the use and sharing of information regarding "wages, commissions, performance, or identity of employees" are central to many types of NLRA-protected activities,[36] and the Noncompete Agreement prohibits each and every type of use or disclosure of such information. It is also clear that Respondent has a legitimate justification, in many contexts, for preventing competitors, customers and various other parties from obtaining this type of information. Nonetheless, for reasons similar to those discussed above concerning Rule 12, paragraph 2 (prohibiting the direct or indirect disclosure of "information concerning . . . employees" or the use of such information "in any way"), I believe the Noncompete Agreement's prohibition would severely impede or altogether preclude many types of NLRA-protected activity, and Respondent—although justified in preventing competitors, customers and certain other third parties from obtaining this information—has not identified any interest that justifies the scope of this prohibition. For this reason, I concur in my colleagues' finding that the Noncompete Agreement's unlimited prohibition against any employee's "disclos[ure]" or "use" of "information pertaining to the wages, commissions, performance, or identity of employees" violates Section 8(a)(1).

4. *Rule 26 ("Conflicts of Interest").* Rule 26, "Conflicts of Interest," directs employees to "avoid activities that could appear to influence their objective decisions relative to their company responsibilities." The rule then states that continued employment with the company depends on strictly avoiding several such activities, including "conflicts of interest" or "perceived conflict[s] of interest," such as supervising "an immediate family member or a person with whom they have an intimate relationship," having a financial interest in a competitor, and "activities that might appear to result fraud or waste." Paragraph (b) of Rule 26 also requires strict avoidance of "conduct on or off duty which is detrimental to the best interests of the company or its employees." Although Rule 26 lists several types of activities, the only portion that is alleged to be unlawful is the prohibition against "detrimental conduct."[37] The Respondent argues that Rule 26 is a "typical, garden variety prohibition against usurpation of corporate opportunities" and pitting "the employee's pecuniary gain against" the Respondent's. The Respondent further argues that this is fleshed out by the rule's specific examples, such as the prohibition against having a financial interest in a supplier or competitor or the injunction to avoid fraud or waste. The General Counsel argues that paragraph (b) is unlawful because it fails to provide any examples of what the Respondent deems to be detrimental conduct, and "it is possible" that the Respondent views unionization as in conflict with its best interests and that employees would attribute this view to the Respondent. My colleagues find paragraph (b) unlawful for essentially these reasons.

Under the *William Beaumont* balancing test, I would find Rule 26 lawful. The Respondent's prohibition of "conduct on or off duty which is detrimental to the best interests of the company or its employees" is included under the rubric "Conflicts of Interest" and surrounded by examples of conduct that unquestionably pose a conflict of interest: e.g., supervising an immediate family member, supervising someone with whom one has an intimate relationship, fraud, and maintaining a financial interest in a competitor. Given the concrete examples of "detrimental conduct" in Rule 26, there is little reason to conclude that either the aim or the result of this language

[36] In many cases, however, the disclosure of these types of information does *not* constitute activity protected by Sec. 7, since employees, when discussing their wages, commissions or performance evaluations, may be engaged in "mere griping" rather than concerted activity for the purpose of mutual aid or protection. See, e.g., *Daly Park Nursing Home*, 287 NLRB 710, 710–711 (1987) (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). See generally *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 13–17 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[37] For ease of reference, I use the phrase "detrimental conduct" as a shorthand reference to the Rule 26 language prohibiting "conduct on or off duty which is detrimental to the best interests of the company or its employees."

is to dampen Section 7 activity. Rather, Rule 26 serves as a commonsense guideline to employees to avoid conduct that could objectively create a conflict of interest detrimental to the Respondent's interests.

The addition of a general, "catchall" prohibition of "conduct on or off duty which is detrimental" to Respondent's interests does not alter the rule's focus on genuine conflicts of interest. As I have previously noted, "there is no law against using an understandable catchall phrase as a general statement of policy," particularly where the surrounding rule illustrates the types of behavior encompassed within its scope. *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 11 (2014) (Member Miscimarra, dissenting in part), enfd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015); see also *William Beaumont*, supra, slip op. at 13 fn. 29 (Member Miscimarra, concurring in part and dissenting in part). To the extent that Respondent *applies* the "detrimental conduct" prohibition against protected concerted or union activity, the Board could independently evaluate the Respondent's actions and, depending on the circumstances, conclude that they violate Section 8(a)(1). However, I believe the Board should find that Respondent did not violate the Act by maintaining Rule 26's prohibition against conflicts of interest, including "conduct . . . detrimental to the best interests of the company." I believe this rule serves a legitimate purpose unrelated to NLRA-protected activity, and the mere maintenance of this rule would not have any greater an impact on NLRA rights than "just cause" provisions that have existed in collective-bargaining agreements throughout the Act's history.[38] Accordingly, applying the balancing test that I believe is required as explained in *William Beaumont*, I would find that Rule 26 is lawful.

C. Even Under the Lutheran Heritage "Reasonably Construe" Test, Parts of Rule 12, and Rule 26 in Its Entirety, Are Lawful

Even applying *Lutheran Heritage*, I disagree with the majority's finding that Respondent violated Section 8(a)(1) of the Act by maintaining the portions of Rule 12 that I believe are lawful (excluding the parts of Rule 12 I found unlawful above). I likewise disagree that under *Lutheran Heritage*, the Respondent violated Section 8(a)(1) by maintaining Rule 26.

Lutheran Heritage provides that maintenance of a facially neutral rule violates the Act if employees would reasonably construe it to prohibit Section 7 activity. 343 NLRB at 647. The "reasonably construe" standard derives from the Board's pronouncement in *Lafayette Park Hotel* that work rules are unlawful if they "reasonably tend to chill employees in the exercise of their Section 7 rights."[39] However, in *Lafayette Park Hotel*, the Board found that "employees would not reasonably fear" that a generally stated rule against "unlawful or improper conduct" would be used by the employer to "punish them for engaging in protected activity." 326 NLRB at 827. In fact, the Board stated that ascribing such a meaning to a generic prohibition on "unlawful or improper conduct" would be, "quite simply, farfetched." Id. *Lutheran Heritage* explicitly incorporated *Lafayette Park*'s approval of general, commonsense rules, stating that the Board must "give the rule a reasonable reading . . . refrain from reading particular phrases in isolation . . . and not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. The Board also recognized that "[w]ork rules are necessarily general" and assured employers that it "will not require [them] to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." Id. at 648.

I believe my colleagues contradict these principles in their finding that Rule 12's prohibition against disclosing "information concerning customers" violates the Act. As the judge found, "an employee reading these rules *would*

[38] See *William Beaumont*, supra, slip op at 12-14 & fns. 22, 29 (Member Miscimarra, concurring in part and dissenting in part) (noting that the Board and courts have approved "just cause" provisions, and that "generalized provisions related to employment . . . have been deemed acceptable throughout the Act's history").

[39] 326 NLRB at 825. As I pointed out in my dissent in *William Beaumont*—echoing former Member Hurtgen—the statement in *Lafayette Park Hotel* that a rule violates Sec. 8(a)(1) if it "would reasonably tend to chill employees in the exercise of their Section 7 rights" fails to account for the fact that a rule may reasonably chill the exercise of Sec. 7 rights but still be justified by significant employer interests. As Member Hurtgen pointed out, no-solicitation rules restrict the exercise of Sec. 7 rights (by subjecting employees to discipline or discharge if they engage in solicitation—including union solicitation—during working time), but these restrictions have been deemed lawful based on Board precedent dating back more than 70 years establishing that "[w]orking time is for work" and that the employer's interest in production outweighs the Sec. 7 right of employees to engage in solicitation during working time. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). See *William Beaumont*, 363 NLRB No. 162, slip op. at 12 fn. 19 (Member Miscimarra, concurring in part and dissenting in part). In addition, employers may lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer's facility and outside work areas, even if off-duty employees desire access to engage in protected picketing, handbilling or solicitation, see *Tri-County Medical Center*, 222 NLRB 1089 (1976), and employers may also lawfully maintain attendance rules under which employees may be disciplined or discharged for failing to come to work, even though employees have a Sec. 7 right to engage in protected strikes. Each of these rules is lawful, notwithstanding it "would reasonably tend to chill employees in the exercise of their Section 7 rights."

reasonably understand that the rules were designed to protect and insulate the Respondent from situations which would compromise its financial, trade secret, brand name and other proprietary interests including the 'good will' associated with the Respondent's brand name and *the acquiring and retention of customers* . . ." (emphasis added).

Although my colleagues disagree—asserting that prohibiting disclosure of "information concerning customers" "clearly would be understood by employees" to affect protected activity—I believe their interpretation of the phrase "information concerning customers" is unreasonably broad. Their interpretive approach would result in finding that virtually *every* legitimate non-disclosure requirement limits NLRA-protected activity, even though the subject has nothing to do with employment, whenever a multi-step rationale can be devised linking the subject (in this case, sensitive customer information) to NLRA-protected activity. For example, my colleagues find employees would reasonably construe "information concerning customers" to include information about employee compensation because (i) employee compensation is based on commissions, (ii) commissions are based on sales, and (iii) sales are made to customers. Respectfully, I believe that this type of "six degrees to protected concerted activity" interpretation would only be adopted by labor lawyers and only if they focus exclusively on the NLRA, which highlights one of the principal reasons that I believe the *Lutheran Heritage* "reasonably construe" test should be abandoned.[40] However, even if one applies the "reasonably construe" standard, I believe that a reasonable employee would interpret this language as protecting proprietary information concerning customers that could be used by the Respondent's competitors, such as customer lists and orders, together with other confidential information about customers that employees may receive in the course of their employment. Moreover, under my colleagues' interpretation, the prohibition on disclosing "information concerning customers" is effectively a prohibition on the disclosure of information concerning employees. However, this interpretation renders superfluous Rule 12's separate prohibition on disclosure of "information concerning . . . employees," which I agree is unlawful.

For similar reasons, I disagree with my colleagues' finding, applying *Lutheran Heritage*, that Respondent violated Section 8(a)(1) by maintaining the "detrimental conduct" provision in Rule 26. My colleagues reject the judge's reliance on other conflicts of interest recited in Rule 26 that would inform how employees would reasonably construe the prohibition against "[c]onduct on or off duty which is detrimental to the best interests of the company or its employees." In my view, the Board majority improperly discounts those other conflict-of-interest provisions. Read together with those provisions, Rule 26's "detrimental conduct" language would be reasonably construed as referring to "activities that could appear to influence their objective decisions relative to their company responsibilities," as Rule 26 itself states. I disagree with the majority's finding that the logical connection between the "detrimental conduct" language and the remainder of Rule 26 is too "attenuated" to affect any employee's interpretation of that language. The inclusion of a general prohibition on "conduct . . . detrimental to the best interests of the company" among more specific prohibitions of particular conflicts of interest clearly indicates that "detrimental conduct" is intended to encompass similar conflict-of-interest situations not specifically listed.[41] As stated in *Lutheran Heritage* itself, 343 NLRB at 648, there is nothing inherently unlawful about articulating generalized standards of conduct, and faulting the Respondent for maintaining such rules, as the majority does, improperly presumes "interference with employee rights." Id. at 646.

Nor does the record support the majority's finding that employees would reasonably read the "detrimental conduct" rule in conjunction with the Respondent's stated preference to remain nonunion. In contrast to the conflict-of-interest provisions that immediately surround the "detrimental conduct" rule, Respondent's preference is stated in a completely different section of the handbook, 10 pages removed from Rule 26. Moreover, it is entirely lawful for the Respondent to express a view in opposition to union representation, and my colleagues do not suggest otherwise. There is a good reason for this: Section 8(c) of the Act prohibits the Board from supporting any unfair labor practice finding with this type of lawful statement of opinion. Section 8(c) states that "[t]he expressing of any views, argument, *or opinion*, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute *or be evidence of an unfair labor practice* under any of the provisions of this Act . . ." (emphasis added).[42] See also *NLRB v. Gissel*

[40] The "six degrees of separation" theory is based on the proposition that "everyone and everything is six or fewer steps away . . . from any other person in the world." See https://en.wikipedia.org/wiki/Six_degrees_of_separation (theory that every person is six or fewer acquaintances removed from every other person) (last visited May 21, 2016).

[41] Under the principle of *noscitur a sociis*, the meaning of an unclear word or phrase may be known from accompanying words. See http://www.duhaime.org/LegalDictionary/N/Nosciturasociis.aspx.

[42] Sec. 8(c) ends with a proviso: expressing any views, argument, or opinion shall not constitute or be evidence of an unfair labor practice

Packing Co., 395 U.S. 575, 618 (1969) (holding that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'").

The rationale adopted by my colleagues here is also nearly identical to the argument *rejected* by the Board in *Lafayette Park Hotel*, supra. There, the employer maintained a rule prohibiting employees from "engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives," and the General Counsel argued that "employees could reasonably assume that a 'goal' of the hotel is to remain nonunion."[43] Using reasoning that has equal application to this case, the Board majority rejected the General Counsel's argument and upheld the rule:

> We conclude that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. In this regard, *the rule, in providing that it is unacceptable for employees to engage in conduct that does not support the Respondent's "goals and objectives," addresses legitimate business concerns*. . . . We find no ambiguity in this rule as written. Rather, *any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase "goals and objectives" in isolation, and attributing to the Respondent an intent to interfere with employee rights.* We are unwilling to place such a strained construction on the language, and we find that employees would not reasonably conclude that the rule as written prohibits Section 7 activity.
>
> Furthermore, the Respondent has not by other actions led employees reasonably to believe that the rule prohibits Section 7 activity. Thus, the Respondent *has not enforced the rule against employees for engaging in such activity*, and there is *no evidence that the Respondent promulgated the rule in response to union or protected concerted activity or that those employees even engaged in any such activity*. Moreover, there is no evidence that the Respondent exhibited antiunion animus. In these circumstances, to find the maintenance of this rule unlawful, as do our dissenting colleagues, *effectively precludes a common sense formulation by the Respondent of its rule and obligates it to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply. Such an approach is neither reflective of the realities of the workplace nor compelled by Section 8(a)(1).*[44]

When the Board decided *Lutheran Heritage*, it substantially relied on *Lafayette Park Hotel*, which it cited for the propositions that, when "determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading . . . [and] refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, supra, 343 NLRB at 646 (citing *Lafayette Park Hotel*, supra, 326 NLRB at 825, 827). I believe my colleagues disregard these principles when, applying *Lutheran Heritage*, they find that Respondent's maintenance of Rule 26 violates the Act.

Conclusion

Accordingly, for the above reasons, I concur in part with and dissent in part from my colleagues' decision.

Dated, Washington, D.C. June 10, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule in our employee handbook, under the heading "Solicitation and Organizational Work," that prohibits solicitation during nonwork time in work areas.

"if such expression contains no threat of reprisal or force or promise of benefit." There is no allegation that Respondent's handbook statement expressing a preference to remain nonunion contained any threat or promise.

[43] 326 NLRB at 825.

[44] Id. at 825–826 (emphasis added).

WE WILL NOT maintain a rule in our employee handbook, under the heading "Security of Company Information," that prohibits the disclosure of information concerning employees, customers, or "Schwan's business."

WE WILL NOT maintain a rule in our employee handbook, under the heading "Use of the Company Name," that requires you to obtain company approval of any material meant for publication in which the company's name is mentioned or indicated.

WE WILL NOT maintain a rule in our employee handbook, under the heading "Conflicts of Interest," that prohibits you from engaging in conduct that is "detrimental to the best interests of the company or its employees."

WE WILL NOT maintain a provision in our Employment, Confidentiality, Ownership & Noncompete Agreement (ECONA) that prohibits you from disclosing information about the wages, commissions, performance, or identity of employees to anyone not employed by the company.

WE WILL NOT maintain language in our standard suspension notice that prohibits you from discussing your status with anyone, inside or outside the company, during periods of disciplinary suspension or when you are suspended pending investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the rule in our employee handbook, under the heading "Solicitation and Organizational Work," that prohibits solicitation during nonwork time in work areas.

WE WILL rescind the rule in our employee handbook, under the heading "Security of Company Information," that prohibits disclosure of information concerning employees, customers, or "Schwan's business."

WE WILL rescind the rule in our employee handbook, under the heading "Use of the Company Name," that requires you to obtain company approval of any material meant for publication in which the company's name is mentioned or indicated.

WE WILL rescind the rule in our employee handbook, under the heading "Conflicts of Interest," that prohibits you from engaging in conduct that is "detrimental to the best interests of the company or its employees."

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful rules above have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

WE WILL rescind the provision in our ECONA that prohibits you from disclosing information about the wages, commissions, performance, or identity of employees to anyone not employed by the company, and WE WILL notify you in writing that this has been done and that the provision is no longer in force.

WE WILL rescind the language in our standard suspension notice that prohibits you from discussing your status with anyone, inside or outside the company, during periods of disciplinary suspension or when you are suspended pending investigation, and WE WILL notify you in writing that this has been done and that the provision is no longer in force.

SCHWAN'S HOME SERVICE, INC., A WHOLLY OWNED SUBSIDIARY OF THE SCHWAN FOOD COMPANY

The Board's decision can be found at www.nlrb.gov/case/27–CA–066674 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Todd D. Saveland, Esq. and *Renee C. Barker, Esq.*, for the General Counsel.

Amy J. Zdravecky, Esq. (Franczek Radelet), of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to a notice of hearing in this matter was held before me in Denver, Colorado, on March 27, 2012. The charge in the captioned matter was filed by Patrick K. Wardell, an individual, on August 29, 2011,[1] and an amended charge was filed by Wardell on November 30, 2011. Thereafter, on December 30, 2011, the Regional Director for Region 27 of the National Labor Relations Board (Board) issued a consolidated complaint and notice of hearing alleging violations by Schwan's Home Service, Inc., a wholly owned subsidiary of the Schwan Food Company (Respondent) of Section 8(a)(1) of the National Labor Relations Act (the Act).[2] The Respondent, in its answer to the complaint,

[1] This filing date appears as amended at the hearing.

[2] The consolidated complaint contains an additional case number (Case 27–CA–021969). On March 26, 2011, the Regional Director

duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Acting General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Minnesota corporation with offices and places of business throughout the United States, including a facility in Loveland, Colorado. The Respondent is engaged in the production, manufacturing, marketing, distribution, retail, and nonretail sale of frozen food products. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $500,000 and annually receives and purchases at its Loveland, Colorado facility, goods, materials, and services valued in excess of $5000 directly from points outside the State of Colorado. It is admitted and I find that the Respondent is, and at all material times has been, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has promulgated and maintained rules and policies in various documents that restrict employee Section 7 rights in violation of Section 8(a)(1) of the Act.

B. Background Facts and Analysis

The Respondent sells quality frozen food products to residential and business customers, door to door. It employs about 7000 employees, working out of approximately 400 facilities, called depots or warehouses, located in the contiguous 48 states. Each depot has about 16 route sales representatives who sell and deliver the products, using refrigerated vehicles furnished by the Respondent. In addition, each depot has from two to four warehouse employees who receive products from suppliers and load up the route sales representatives' trucks each day.

The complaint alleges that certain employee handbook policies, and other company rules, contracts, and suspension and termination notices contain facially unlawful provisions that would reasonably tend to chill employees' Section 7 rights to engage in concerted protected activity and/or union activity.

Dave Bock, Respondent's vice president and assistant general counsel, is also the Respondent's ethics officer and corporate affirmative action compliance officer. Bock testified as follows regarding the daily routine of the route sales representatives:

> It's a long day for what we call our RSRs, route sales representatives. They come in the morning, anytime between 8:00 and 10:00. There's usually a group meeting where they get together and they'll discuss their products. There's a lot of comradery. They all meet in one common area in the depot, usually a square or round table in the middle. They'll have stools or chairs around this table. They get their orders ready, any preorders they might have that day. They talk to each other. Management is present sometime during those meetings. They get in their trucks and they head out. And after a long day, they come back to the same depot at night, handle their records, their orders, make delivery to the local bank and most depots to make their deposits for the day. So there's—the employees get together before each day's shift, and they get together each day after their shifts.

Bock testified that he has been present during many of these group meetings and has listened to the employees' discussions about wages, hours, and working conditions, including complaints about supervisors. Such discussions are routine, and are not discouraged. All route sales representatives in a given geographic area are paid the same base salary, with commissions based on all sales and with additional guarantees for showing up to work and meeting time targets.

According to Bock, the earnings of each route sales representative is

> an open book. You walk into a depot. Each employee's sales goals and actual day-to-day sales are posted for everyone to see. It's a very competitive environment, generally, a very friendly competitive environment. Employees are teasing each other about outdoing each other or about a bad day they might have had. But the numbers are posted for all to see and are the subject of much discussion.

Such discussions are encouraged; no employee has ever been disciplined for discussing sales goals or compensation numbers with other employees and each employee knows, on a daily basis, how much their coworkers are earning.

At all material times, the Respondent has maintained and issued to all new hires, including warehouse workers and route sales representatives, an employee handbook consisting of 29 pages, entitled the "Schwan Food Company Employee Handbook." Four of the rules contained in the current Employee Handbook are at issue in this matter. [3] The Respondent has denied that any portions of the rules are unlawful.

> (Rule 18): Solicitation and Organizational Work
>
> With the exception of the annual United Way drive and other charitable activities sponsored by the company, all employees are strictly prohibited from soliciting other employees or being solicited by other employees or non-employees for any purpose during working time in any work area of a plant or other company facilities. **Distribution and solicitation is permitted during non-work time (such as free time, rest breaks or lunch time) in non-work areas (break room) of a plant or other company facilities).**
>
> (Rule 12): Security of Company Information

severed that case from complaint and the allegations pertaining to that case were rescinded.

[3] The alleged unlawful provisions of the rules are in bold type.

You are not permitted to reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons. Trade secret information including, but not limited to, information on devices, inventions, processes and compilations of information, records, specifications, and information concerning customers, vendors or employees shall not be disclosed, directly or indirectly, or used in any way, either during the term of employment or at any time thereafter, except as required in the course of employment with Schwan. Employees will abide by Schwan's policies and practices as established from time to time for the protection of its trade secret information. **Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction.**

(Rule 17): Use of the Company Name

You are not permitted to purchase any material as a charge to the company without authorized management approval. **Any articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated, must be submitted, through your supervisor, for approval or disapproval by the Corporate Communications and Law Departments prior to release.** You are not permitted to negotiate or sign any lease, purchase agreement, bill of sale, contract or other legal document as a representative of the company, unless authorized to do so by management nor are you permitted to express or imply to any vendor the intention of the company to purchase, rent or lease any tangible property, equipment, material, space or services.

(Rule 26): Conflicts of Interests

Employees shall avoid activities that could appear to influence their objective decisions relative to their company responsibilities.
Continued employment with the company is dependent upon strict avoidance of:
a. Conflicts of interest or the appearance of such conflicts.
b. Conduct on or off duty which is detrimental to the best interests of the company or its employees.
c. Employees shall avoid activities that might appear to result in fraud or waste.
d. Employees may not engage in any activity, on or off company premises, or be employed in any capacity at Schwan which creates a actual or perceived conflict of interest (e.g. an employee may not supervise an immediate family member or a person with whom they have an intimate relationship; an employee may not have a financial interest in a supplier or competitor). Please contact your local Human Resource representative for specifics on how the employment of relatives is handled in your facility.

The General Counsel maintains that Rule 18 is unlawful because it specifically permits distribution and solicitation during nonwork time in nonwork areas and, accordingly, would be reasonably understood by employees to prohibit such activity in work areas during employees' nonwork time; therefore, this restriction constitutes an impermissible infringement on employees' solicitation and distribution rights under the Act as set forth in *Republic Aviation, Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945).

In *UPS Supply Chain*, 357 NLRB 596 (2011), the Board stated:

> We find, contrary to the judge, that the Respondent's no-solicitation rule violates Section 8(a)(1). Employers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time. See, e.g., *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) ("[A]n employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas.") (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112–113 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945)). In discussing the Respondent's no-solicitation rule, the judge focused solely on the restrictions placed on employees' work time. However, the Respondent's rule also prohibits solicitation in work areas, and does so without qualification. Fairly read, an employee would reasonably understand the rule to ban solicitation in work areas even during nonwork time. The rule is therefore impermissibly overbroad and violates Section 8(a)(1).

Bock testified that the Respondent has a "very open culture" with regard to employee discussions of wages; hours, and working conditions that permits such discussions on working time in working areas. Further, this policy has been extended to situations in which the employees, prior to impending union elections at two depots, one in Round Rock, Texas about 18 months ago, and another in Denver during an unspecified time period, were encouraged by Bock and other corporate representatives to discuss union representation "pro and con" during working time and in working areas, "not only in our presence, but then we left and said continue your discussion, both sides . . . in the interest of making a full and fair informed decision." Bock testified that in this manner the Respondent's "solicitation policy" not only has not been used to preclude union activity but rather has been used to encourage such discussion.[4]

Employees' discussions of wages and related matters among themselves in a spirit of competitive camaraderie seem clearly designed as a company policy to promote sales production; however, mere "discussions" are not tantamount to either "solicitation" or "distribution," and therefore employees would not reasonably interpret this interactive competitiveness as an invitation to discuss, solicit for, and distribute materials on behalf of unions during worktime and in work areas.[5] Further, I find

[4] It appears, therefore, that Bock would equate employees' merely expressing their pro-union views during such discussions as "solicitation." Bock did not testify that employees at these meetings were also encouraged to engage in "solicitation" of union authorization cards or "distribution" of union materials.

[5] This is particularly true given the Respondent's handbook policy entitled "Company Philosophy Towards Labor Unions," including the following: "The company is opposed to the unionization of Schwan because the needs of our employees are best served by retaining the ability to converse one-on-one with management, avoiding third party intervention and rewarding employees based on each employee's individual merit…By remaining union free, the working atmosphere be-

that Bock's anecdotal evidence in this regard—involving two of 400 depots nationwide, and perhaps fewer than 40 employees—is insufficient to put all 7000 of the Respondent's employees on notice that they may ignore the plain meaning of the language in Handbook Rule 18 which implicitly, but clearly, prohibits solicitation and distribution in work areas. Indeed, to the extent other employees at other depots may be aware of the discussions that occurred in Round Rock, Texas, and Denver, it appears they would reasonably conclude that specific permission by management is needed before such union-related discussions during worktime in work areas may take place. Accordingly, I find that by maintaining the rule in its handbook the Respondent has violated and is violating Section 8(a)(1) of the Act as alleged.

Regarding Handbook Rule 12, Security of Company Information, Handbook Rule 17, Use of the Company Name, and Handbook Rule 26, Conflicts of Interests, I conclude that an employee reading these rules would reasonably understand that the rules were designed to protect and insulate the Respondent from situations which would compromise its financial, trade secret, brand name, and other proprietary interests including the "good will" associated with the Respondent's brand name and the acquiring and retention of customers which could be adversely affected by inappropriate employee conduct "on or off duty." I do not believe the rules, singly or collectively, even though they prohibit disclosure of information regarding employees and also prohibit certain employee conduct, would reasonably cause this Respondent's employees to refrain from protected activity under the Act. I shall dismiss these allegations of the complaint. See *Lafayette Park Hotel*, 326 NLRB 824 (1998); *Super Kmart*, 330 NLRB 263 (1999); *Mediaone of Greater Florida*, 340 NLRB 277 (2003).

The complaint alleges that certain language contained in Respondent's "Employment, Confidentiality, Ownership & Noncompete Agreement" (Agreement) is unlawful. The Agreement is a lengthy, single-spaced, small font, difficult-to-read, two-page, double-sided, standardized document. All Respondent's employees are required to execute the Agreement at the time of hire and again sign the then-current Agreement when they are promoted or change jobs within the Company. Under the heading "Confidential and Proprietary Information; Ownership and Assignment of Rights," the following paragraph appears:

> **Stipulation.** Employer and Employee agree that during the course of Employee's employment, Employee will have access to Confidential and Proprietary Information as defined below. Such information has been developed by Employer at great expense over many years of substantial effort, *and were competitors of Employer to obtain such information there would result a substantial and irreparable adverse effect upon the business of Employer.* Employee agrees that the Employer owns all such Confidential and Proprietary Information. (Underlining supplied.)

Under the heading **"Scope"** the Agreement goes on to state, "Confidential and Proprietary information shall include any information pertaining in any way but not limited to . . .," and then sets forth an extensive catalogue of what is considered to be encompassed within the definition of confidential and proprietary information. Toward the end of this litany of matters, items and concepts that the Respondent deems to be confidential and proprietary, is included the following: "any information pertaining to the wages, commissions, performance, or identity of employees of Employer."

The complaint alleges and the General Counsel maintains that as the Agreement restricts employees from disclosing to "any person not in the employ of the Employer" any "Confidential or Proprietary" information, and as confidential and proprietary information includes the above-quoted language pertaining to the "wages, commissions, performance or identity of employees," such a restriction precludes employees from sharing such information with a union and is therefore violative of Section 8(a)(1) of the Act.

I conclude that employees entering into the Agreement, who make the effort to read through it, would reasonably understand that the Respondent in this portion of the Agreement is concerned with, and is attempting to prohibit the route sales representatives from disclosing, "confidential and proprietary" information to the Respondent's "competitors," and that this is the thrust, import and intent of this section of the Agreement. The Respondent has legitimate concerns that its route sales representatives could be more easily recruited away from the Respondent by competitors if competitors became aware of the identity, performance skills, and earnings of particular route sales representatives. Accordingly, I find that employees would not reasonably read this rule as prohibiting Section 7 activity. I shall dismiss this allegation of the complaint. See *Mediaone of Greater Florida*, supra, at page 279.

The complaint alleges that certain language contained in Respondent's termination letters is unlawful. The Respondent, in a prehearing document headed: "Joint Stipulation and Joint Exhibits" stipulated that

> At times material to this proceeding, the Respondent issued termination letters at various times and to various employees nationwide, which stated:
>
> > In addition, the intent of this letter is to inform you that you are prohibited by the terms of the employment agreement you signed with Schwan's from contacting your former customers and former co-workers.

In support of this stipulation a termination letter dated April 22, 2011, containing the above language was introduced in evidence by the General Counsel

However, despite this stipulated language, the Respondent, prior to the hearing herein engaged in an extensive, random investigation of termination letters, which demonstrated that not one of the hundreds of termination letters issued over an extended period of time contained language prohibiting terminated employees from contacting "former co-workers."[6] Rather, all of the termination letters, introduced into evidence,

tween employees and between employees and management will remain open and honest."

[6] Obviously, the Respondent's random investigation did not uncover the letter introduced into evidence by the General Counsel in support of the stipulation.

randomly compiled due to the fact that there were simply too many terminations to perform an exhaustive survey,[7] contained the following language:[8]

> This letter will also serve as a reminder that at the time of hire, you executed an Employment, Confidentiality and Non-compete agreement, which includes, but is not limited to an agreement that you will not contact Home Service Customers you previously serviced during your employment.

The General Counsel maintains that the language in either termination letter, whether prohibiting terminated employees from contacting former customers, or from contacting both former coworkers and customers, is similarly violative of the Act.

I credit the testimony of Bock and find that he personally caused the survey to be conducted by subordinates in a valid and unbiased manner that was not manipulated to arrive at a preconceived result. Accordingly, I find that the standard form for termination letters contains the immediately foregoing language, and not the language set forth in the stipulation. Thus, while the stipulation states that termination letters "at various times and to various employees nationwide" contained the stipulated language, the evidence shows, and I find, that such letters do not reflect the Respondent's standard and customary practice.

Bock testified that the relationship between the route sales representatives and customers is commonly a very close relationship that could be compromised in the event of termination. The route sales representatives deliver products to customer's homes and businesses on a regular basis, sometimes receive gifts from customers for good service, have the credit card numbers of customers, and often have access to the customers' homes when they are away so that frozen food products may be placed in the customers' freezers. For obvious reasons the Respondent simply does not want the customers to become enmeshed in termination matters: not only could this cause the customers to refrain from buying products from the Respondent, but also terminated employees could attempt to solicit business for competitors of the Respondent.

The termination letters refer to the "employment agreement" or "Employment, Confidentiality and Non-compete" agreement as the underlying document restricting contact between terminated employees and customers or former co-workers. Accordingly, the termination letters alone are inherently incomplete, and the termination letters and Agreement to which the letters refer must be read together.

The portion of the Agreement pertaining to contacting customers is as follows:

> Employee agrees that during the term of Employee's employment and for twelve (12) months after the termination of such employment, Employee will not…contact or solicit competing business from anyone who had been a customer of Employer in the geographic or job function areas assigned to Employee.

The portion of the Agreement pertaining to contacting former co-workers is as follows:

> Employee agrees that during the term of Employee's employment and for twelve (12) months after the termination of such employment, Employee will not induce or attempt to induce any person who is an employee of Employer to leave the employ of Employer and engage in any business which competes with Employer.

I find that a reasonable reading of either termination letter together with the Agreement would cause a terminated employee to understand that the restrictions regarding contacting either current employees or customers is not designed to curtail activity protected by Section 7 of the Act, but rather is designed to preclude terminated employees from enmeshing customers in termination matters and from recruiting either customers or current employees for competitors of the Respondent. Accordingly, the Respondent has overriding legitimate business considerations for imposing such restrictions. I shall dismiss this allegation of the complaint.

The complaint alleges that certain language contained in the Respondent's "Employee Suspension Notice" is unlawful. Insofar as the record evidence shows, the Employee Suspension Notice is a one-page pre-printed document issued to employees who are being placed on an unpaid suspension either for disciplinary reasons or pending the outcome of an internal investigation. The notice contains a space for specifying the reason(s) for the suspension, and advises the employee of certain requirements and prohibitions to which the employee must adhere during the suspension/investigation.

The parties stipulated that:

> At times material to this proceeding, the Respondent issued suspension notices at various times and to various employees nationwide, which stated:
>
> > You are prohibited from contacting customers or employees and from discussing your status with anyone inside or outside the company.

In addition, the single suspension notice introduced into evidence in this proceeding, dated July 27, 2011, contains further prohibitions:

> You are prohibited from entering any property owned or leased by The Schwan Food Company, unless requested by your manager or the investigator.
>
> You are prohibited from accessing any company information during this suspension. Not limited to, but including any e-mails or voicemails.

A blanket rule prohibiting employees under investigation for rule or policy infractions from contacting and discussing the matter with other employees during the course of the investigation is per se unlawful. The Board, in *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), adopted the conclusion of the administrative law judge on this issue, who stated, at slip op. p 15, as follows:

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[7] Bock testified that the Respondent's voluntary and involuntary termination rate at the current time "is about 60 percent a year right now…so you're talking about 4,000 plus terminations."

[8] A few of the letters contained no language whatsoever prohibiting the contacting of either customers or former co-workers.

> In light of the *Phoenix Transit* and *[Caesar's] Palace* cases,[9] it seems obvious that the Board is attempting to strike a balance between the employees' Section 7 right to discuss among themselves their terms and conditions of employment, and the right of an employer, under certain circumstances, to demand confidentiality. The burden is clearly with an employer to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights.
>
> I am of the view that in the matter at hand, the Respondent has failed to meet its burden. It is undisputed that the Respondent's managers and human resource supervisors routinely instruct employees involved in investigations not to talk with other employees about the substance of those investigations. Such admonitions are apparently given in every case, without any individual review to determine whether such confidentiality is truly necessary. Under the Board's balancing test, it is the Respondent's responsibility to first determine whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up. Only if the Respondent determines that such a corruption of its investigation would likely occur without confidentiality is the Respondent then free to prohibit its employees from discussing these matters among themselves.
> There is no evidence that the Respondent conducts any such preliminary analysis. To the contrary, it seems that the Respondent merely routinely orders its employees not to talk about these matters with each other.
>
> The Respondent has failed to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights. It has failed to meet its burden of proof. Accordingly, I conclude that the Respondent has unlawfully maintained an overly broad and discriminatory oral rule prohibiting employee from discussing matters under investigation and by implicitly threatening employees with discipline if they violate that rule.

The Respondent maintains that the evidence introduced by the General Counsel does not show that the Respondent's prohibition applies in all suspension situations. Thus, the aforementioned stipulation merely concedes that the Respondent issued such suspension notices "at various times and to various employees nationwide."

Unlike the similar stipulated language pertaining to the termination notices, supra, however, regarding which the Respondent initiated an extensive investigation and survey and introduced abundant evidence that the single termination notice placed in evidence by the General Counsel appeared to be an anomaly or at least not a standard and customary practice, the Respondent has not demonstrated that the suspension notices, nationwide, as a general practice, do not contain the aforementioned unlawful language. Nor did Bock so testify.

In the instant case it is clear that the Respondent's pro forma suspension notices limiting employees Section 7 right to discuss matters for which they are being investigated, or for which they are receiving a disciplinary suspension,[10] is unlawful. As noted above, an employer may not impose such restrictions absent a substantial justification for doing so in each given situation. *Hyundai America Shipping Agency, Inc.,* supra. Accordingly, by such conduct, I find the Respondent has violated and is violating Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent has violated Section 8(a)(1) of the Act as found herein.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) of the Act, I recommend that the Respondent be required to cease and desist from promulgating and maintaining in effect the employee handbook provision and the standard suspension notice that preclude and interfere with the Section 7 rights of employees to engage in union and protected concerted activity. I further recommend that the Respondent be required to cease and desist from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Schwan's Home Service, Inc., a Wholly Owned Subsidiary of The Schwan Food Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining in effect the employee handbook provision and the standard suspension notice that preclude and interfere with the Section 7 rights of employees to engage in union and protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act:

(a) Modify the employee handbook provision and the standard suspension notice found to interfere with the rights of employees to engage in union and protected concerted activities

---

[9] *Phoenix Transit Systems,* 337 NLRB 510 (2002); *Caesar's Palace,* 336 NLRB271 (2001).

[10] It would seem to make no difference whether the investigation is taking place while the employee remains on the job, whether the suspension is a disciplinary suspension, or whether the employee is suspended pending investigation. In each of these instances the employee is entitled to exercise his or her Section 7 rights.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

under Section 7 of the Act, and advise its employees, nationwide, by appropriate means, that the handbook provision and the standard suspension notice have been revised.

(b) Within 14 days after service by the Region, post at its facilities nationwide copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative(s), shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Further, when the handbook provision and standard suspension notice have been modified, notify its employees nationwide, by appropriate means, of the new modified handbook and standard suspension notice provisions.

(c) Within 21 days after service by the Regional Office, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. June 6, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above

WE WILL modify our employee handbook provision that limits your right to engage in the above activities during nonwork time in work areas of our facilities.

WE WILL modify our standard suspension notice form that limits the right of suspended employees from engaging in the above activities during periods of disciplinary suspension or when they are suspended pending investigation.

SCHWAN'S HOME SERVICE, INC. A WHOLLY OWNED SUBSIDIARY OF THE SCHWAN FOOD COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-066674 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[20] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Founded in 1852
by Sidney Davy Miller

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July 22, 2016

VIA FEDERAL EXPRESS
U.S. Court of Appeals
District of Columbia Circuit
ATTN: Clerk
333 Constitution Avenue, NW
Washington, DC 20001

16-1251

Re: Schwan's Home Service, Inc. v National Labor Relations Board

Dear Clerk:

Enclosed please find the following for filing with your court:

- Original and 6 copies of Petitioner's Petition for Review of an Agency, Board, Commission, or Officer;
- Decision and Order dated June 10, 2016;
- Petitioner's Corporate Disclosure Statement;
- Certificate of Service

ORIGINAL

Also enclosed is our check number 446328 in the amount of $500.00 representing the applicable filing fee.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Leigh M. Schultz

LMS/cjs

Enclosures

cc: Todd Saveland
Linda Dreeben
Patrick K. Wardell

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